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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-692

WILLIAM VITO DENTAMARO AND
PHILLIP WAGGENHEIM,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH J. BALLIRO
44 School Street
Boston, Massachusetts
Attorney for Petitioners

Of Counsel:
HENRY D. KATZ
44 School Street
Boston, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cases on August 31, 1972, and a Petition for Rehearing which was denied on October 5, 1972.

The Petitioners file herewith a single petition in accordance with Rule 23 (5), their appeals in the lower court having been heard on a consolidated record appendix.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is not yet reported, but is annexed hereto as an Appendix commencing at page 13.

The opinion of the United States Court of Appeals for the Fifth Circuit denying petitioners' Petition for Rehearing is also annexed hereto as an Appendix commencing at page 26.

Judgments Below

The judgments of the United States District Court for the Southern District of Florida were entered on August 16, 1971.

The judgments of the Court of Appeals for the Fifth Circuit were entered on August 31, 1972, and a Petition for Rehearing was denied on October 5, 1972.

Copies of all judgments in the respective Courts will be forwarded to this Court.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

The judgments sought to be reviewed are dated and were entered August 31, 1972. The Petition for Rehearing was denied October 5, 1972.

Questions Presented

1. Must a Motion for Mistrial always be considered to be a waiver of the Double Jeopardy provision of the Fifth Amendment to the United States Constitution?
2. Must a trial judge refuse to grant a Motion for Mistrial whenever a reasonable alternate cure to the prejudice is available?
3. Must a trial judge scrupulously search for alternate cures before declaring a mistrial?

Statutes Involved

18 U.S.C.A.

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C.A.

§ 2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or

money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C.A.

§ 2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps.

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same

is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country.

Constitution

AMENDMENT V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation.

Statement of the Case

This is a petition seeking review of judgments of the Court of Appeals for the Fifth Circuit affirming judgments of conviction of the District Court for the Southern District of Florida.

On June 25, 1970 an indictment was returned against your petitioners charging them and several other co-de-

fendants with a conspiracy in violation of Sections 2314 and 2315 of Title 18, United States Code, to receive, conceal, sell and dispose of securities which moved in interstate commerce, knowing the same to have been stolen. Count II of the indictment charged your petitioners and the others with aiding and abetting the substantive charge of receiving and concealing shares of stolen stock which had moved in interstate commerce. Count III charged them with the transportation of same. All defendants pleaded not guilty.

The first trial was commenced on December 7, 1970, and aborted on December 9, 1970. The second jury trial commenced on June 21, 1971, and your petitioners were found guilty. Petitioners Waggenheim and Dentamaro were convicted on Counts I and II, and Judgments of Conviction were entered on August 16, 1971. Petitioner Waggenheim was ordered imprisoned for two years on Count I and eight years on Count II, said sentences to be served consecutively. Petitioner Dentamaro was order imprisoned for four years as to Count I and eight years as to Count II, said sentences to be served consecutively.

The Court of Appeals affirmed the convictions on August 31, 1972, and Petition for Rehearing was denied October 5, 1972.

Statement of Facts

The first trial commenced on December 7, 1970 against defendants David Iacovetti, Anthony William DeRosa, Robert L. Cardillo, Barry Glen Lipsky, and your petitioners, William Vito Dentamaro and Philip Waggenheim. On December 9, 1970, during the course of resuming the direct examination of a witness proffered by the Government, the Court's attention was called to a matter that would prevent effective cross-examination of the witness

(R. 373), and would require that the attorney for co-defendant Iacovetti would have to withdraw (R. 375, 376). The petitioner Waggenheim moved, in the alternative, for a severance, continuance and mistrial (R. 334, 353, 354). The petitioner Dentamaro joined in the motion for severance (R. 339). The Court denied the motions for severance (R. 341) and continuance (R. 389), and directed mistrials for all defendants except co-defendant Lipsky (R. 389), whose case was severed and ordered to proceed (R. 389). After the luncheon recess, the co-defendant Lipsky's motion for a mistrial was granted (R. 404A, 404B).

Thereafter, the Court denied motions to dismiss and for judgment of acquittal, based on the abortion of the first trial (R. 440, 831).

The second trial of the defendants (except co-defendant Lipsky against whom the Government did not move for trial) commenced on June 21, 1971. The evidence against the defendants was principally contained in the testimony of one Vincent B. Teresa.

Prior to the taking of evidence in the second trial, defendants made clear their intention to call the severed co-defendant Lipsky as a witness on their behalf (R. 461-568).

After the Government rested (S.R. Tr. 621), a voir dire was held, and Lipsky invoked Fifth Amendment guarantees in refusing to testify (S.R. Tr. 625-633). The Court overruled (S.R. Tr. 635) requests of the Petitioners (S.R. Tr. 634) that Lipsky be directed to answer and denied motions for mistrial based on the Court's ruling (S.R. Tr. 636). The co-defendant Iacovetti moved that the Grand Jury minutes "or some portion of it" be read to the petit jury (S.R. Tr. 636, 638), and the Court sustained the Government's objection (S.R. Tr. 638). The defendants directed the Court's attention to the importance of that part of Lipsky's Grand Jury testimony that rebutted Teresa's tes-

timony of alleged conversations (S.R. Tr. 649), and the Court again sustained the Government's objection (S.R. Tr. 639). The petitioners Waggenheim and Dentamaro rested (S.R. Tr. 639, 640).

After an off-the-record conference (S.R. Tr. 641), the Court permitted the *entire* transcript of the Grand Jury testimony of Lipsky to be read into evidence in the cases of co-defendants Iacovetti and Cardillo and the petitioner Dentamaro. In accordance with the petitioner Waggenheim's objection, the jury was instructed to not consider the evidence in the case against Waggenheim (S.R. Tr. 643, 644, 692).

Reasons for Granting the Writ

The reasons proposed by Petitioners for granting the Writ will be stated under each of the headings relating to the respective questions presented.

I. A "Motion for Mistrial" and Its Effect on Double Jeopardy.

The instant case poses the issue of whether a Motion for Mistrial raised in the alternative with motions for severance and for continuance may be considered to constitute a waiver of the Fifth Amendment prohibition against Double Jeopardy. The motions were raised as soon as the Petitioners became aware of the fact that one of their co-defendant's counsel had been associated with the Government's chief witness, Vincent Teresa. The Petitioners and the trial court agreed that the relationship might restrict cross-examination and might, therefore, prejudice the Petitioners. When this issue arose, Teresa had not testified yet and, therefore, no actual prejudice had occurred, although potential prejudice existed. The Court,

however, acceded to the Government's request that neither a continuance nor severance be granted, and the judge declared a mistrial.

The issue of double jeopardy was raised by the Petitioners at their second trial through a Motion to Dismiss, which was denied by the trial court. The Court of Appeals considered the District Court's ruling on this issue, and affirmed it by holding that the Petitioners had waived their Fifth Amendment right against Double Jeopardy by moving in the alternative for severance, continuance or mistrial. This case presents the issue of whether a Motion for Mistrial must always be held to be a waiver of double jeopardy. It is our contention that the question must be answered in the negative, but however it is answered, the question itself is of great significance as a vehicle for clarifying the scope of *United States* v. *Jorn*, 400 U.S. 470, 91 S. Ct. 547 (1971) and standards to be applied.

This Court in *United States* v. *Jorn*, 400 U.S. 470, 91 S. Ct. 547 (1971) reaffirmed the standard of "manifest necessity" set down in *United States* v. *Perez*, 72 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824). Mr. Justice Harlan wrote:

> ". . . The *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." 400 U.S. at 485.

The *Jorn* decision did not deal with the issue of waiver and offers little concrete guidance on this issue, but in *United States* v. *Walden*, 448 F.2d 825 (4 Cir. 1971), reversed on reconsideration *en banc*, 458 F.2d 36 (4 Cir. 1972),

the Court of Appeals, in reversing the trial court, applied the *Jorn* reasoning, and held that the trial court must seek an alternate remedy to a mistrial, and, if one is found, must take it. The Court in its first *Walden** decision held that a mistrial must be avoided in order to, as Mr. Justice Harlan wrote, ". . . not foreclose the defendant's option . . ." *Jorn*, 400 U.S. at 485. The first *Walden* decision upon reconsideration was reversed *en banc* by an evenly divided court which did not report its reasoning. We submit the first *Walden* decision was correct and by its subsequent reversal manifests the confusion in this area.

The *Walden* case dealt with two jurors who inadvertently remained in the Jury Room during a luncheon recess and saw the defendants in handcuffs being removed from the coutroom. The trial court suggested that a motion for mistrial be made by the defendants and rejected other possible curative procedures. After some discussion, counsel for four defendants moved for a mistrial.

The Court of Appeals had little difficulty disposing of the six defendants who had not moved for mistrial but considered at length the four defendants who had.

> "We think the time has come to inquire into such circumstances and to reject a flat rule that mere mouthing of the motion in open court constitutes in every case waiver of a subsequent plea in bar. It is easy to adhere to the established rule in a context where the accused himself clearly and unequivocally solicits a mistrial. . . . We also reject the opposite extreme that an appellate court might entirely disregard 'consent' and thus force the trial judge to face squarely this question of whether the trial ought to continue." *United States* v. *Walden, supra*, 448 F.2d at 930.

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*448 F.2d 825 (4th Cir. 1971).

The *Walden* court held that since the motion for mistrial had been solicited by the trial court, and, perhaps more importantly, since the Court failed to seek alternate remedies to the prejudice, the four defendants had not waived their constitutional rights.

> "Even though the degree of 'voluntariness' for making a mistrial motion that extinguishes the defense of double jeopardy may therefore properly fall short of that required to make a guilty plea, it cannot be diminished unnecessarily by the final granting authority, either by pressing solicitation or by blocking other possible methods of cure so that the defendant is put to an incomplete or uninformed choice. The protection of the Fifth Amendment is not so easily avoided." *Ibid,* at pp. 930, 931.

This Court's aversion to establishing a mechanical rule for this issue is best stated by the following quote which charged the trial judge with limited discretion:

> "Yet we cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." *Jorn, supra,* 400 U.S. at p. 486.

Unquestionably, the issue is further complicated when defense counsel has moved for mistrial and aspects of waiver are interposed. But, again, this Court refused to hold that a defense motion for mistrial always constitutes

a waiver of the prohibition of Double Jeopardy, and the Court's reluctance to establish a rule in this limited area further emphasizes the difficulty of this issue. We submit that the importance to the prosecution, defense and the trial court of this issue is apparent, and the need for guidance in this area manifest.

Further, we submit that this case provides a perfect vehicle for answering these questions. In the instant case, no prejudice had occurred at the time the Petitioners made their motions. These motions were raised in the alternative so that the motion for mistrial might be relied upon if the others were denied. We suggest that this issue will continue to present itself in the future, and therefore *certiorari* should be granted because the case affords a rare opportunity to give some uniformity to this question.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. BALLIRO
44 School Street
Boston, Massachusetts
Attorney for Petitioners

Of Counsel:
HENRY D. KATZ
44 School Street
Boston, Massachusetts

APPENDIX A

IN THE

United States Court of Appeals

for the Fifth Circuit

No. 71-2887

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
DAVID ROBERT IACOVETTI,
WILLIAM VITO DENTARMARO,
ROBERT CARDILLO and
PHILLIP WAGGENHEIM,
DEFENDANTS-APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(August 31, 1972)

Before TUTTLE, COLEMAN AND CLARK,
Circuit Judges.

COLEMAN, *Circuit Judge*: The individuals in this scenario were:

1. David Robert Iacovetti,
2. William Vito Dentarmaro, also known as Willie "D",
3. Anthony William De Rosa, also known as Tony Pulio,
4. Robert L. Cardillo,
5. Phillip Waggenheim,
6. Barry Glenn Lipsky.

De Rosa dismissed his appeal and Lipsky entered a plea of guilty, so the appellate cast is reduced to four.[1]

The indictment was in four counts, subsequently reduced to three.[2] The defendants were charged with:

Count I

Conspiring to violate and violating 18 U.S.C., §§2314 and 2315; 18 U.S.C., §371;

Count II

Knowingly, willfully, and unlawfully receiving, selling and disposing of 655 shares of American Express Company stock of the approximate value of $43,869.69, knowing the same to have been stolen, 18 U.S.C., §§2315 and 2;

Count III

Willfully, knowingly, and unlawfully transporting and causing the same to be transported in interstate commerce from the State of New York to the State of Florida, knowing it to have been stolen in violation of 18 U.S.C., §§2314 and 2.[3]

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[1] De Rosa was indicted in the United States District Court for the Northern District of Illinois, entered a guilty plea and received a sentence concurrent to his sentence in this case. He subsequently dismissed his appeal in this case on December 28, 1971. Lipsky entered a guilty plea after the trial of the other defendants.

[2] Count IV of the indictment was subsequently dropped.

[3] §2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

A second trial resulted in a verdict of guilty on all counts for Cardillo and guilty on the first two counts for Dentarmaro, Iacovetti, and Waggenheim.

The appellants, along with secondary points, vigorously urge that the second trial infringed the prohibition against being twice put in jeopardy for the same offense, United States Constitution, Amendment V. We are compelled to disagree, and the convictions are in all respects affirmed.

I

The Double Jeopardy Issue

The first trial began (Lipsky was then pleading not guilty) on December 7, 1970. The very next day, Vincent Teresa was testifying as a witness for the prosecution. Waggenheim's counsel called for the production of "Jencks" material prior to cross-examination. It was at this point that the fat began to get into the fire.

The trial court agreed and ordered the government to disclose the requested material before the termination of the direct examination of Teresa. Included in this ma-

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§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting.

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * *

§2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps.

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken;

* * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

terial was the transcript of Teresa's grand jury testimony, with certain pages omitted which the trial court held did not have to be provided. This undelivered material contained information concerning a stolen check which showed a prior relationship between Teresa and Iacovetti's attorney.

On December 9, however, this excluded information was voluntarily given to appellants, apparently to avoid the possibility that defense counsel would inadvertently go into it during cross-examination of Teresa.

After receiving this information, all appellants except Iacovetti moved for a severance on the ground that they would be unable fully to cross-examine Teresa because of his privileged relationship with Iacovetti's counsel.

Iacovetti asked for a severance in order to obtain other counsel. Dentarmaro and Waggenheim moved, in the alternative, for a mistrial. All counsel agreed that if Iacovetti's counsel became the subject of an accusation by Teresa, an inference adverse to their clients' interests would necessarily be raised.

The trial court stated his belief that it was "absolutely impossible to try Iacovetti in this case and to require Kessler to continue as counsel for Iacovetti because of all these situations that have developed and the possibility of future developments . . .".

Lipsky's motion for severance was granted, the trial was ordered to proceed against him, and it was announced that the other appellants would be tried at a later date.

Upon being confronted with this development, the government claimed that this procedure would seriously prejudice its case against the other appellants. It therefore moved the trial court to grant a mistrial as to the other appellants and to try Lipsky at a time subsequent to their trial. Lipsky's counsel also expressed concern be-

cause his client would be "tied with them [the other appellants] with this jury". After the noon recess, Lipsky's counsel moved for a mistrial. The motion was granted.

Prior to the second trial appellants moved to dismiss the indictments on the ground that the second trial was precluded by the Fifth Amendment prohibition against double jeopardy. Motion denied.

II

The Second Trial

At the second trial Teresa testified that while vacationing in Miami, Florida, in March of 1969, he met with appellants Cardillo, Iacovetti, and Waggenheim at the Casa Luigi Restaurant. Teresa asked Iacovetti whether he knew anyone who would be in a position to pass stolen securities, i.e., to convert the securities into cash. Iacovetti replied that he would ask an acquaintance in a brokerage firm whether he could handle such securities.

A week later Teresa and the other men met again at the Casa Luigi. Iacovetti stated that he had spoken with a young man employed by a brokerage firm in Miami who was willing to do anything within reason to help out. However, Iacovetti said that the young man would have to be instructed as to what to do with the stolen securities.

A few minutes later, Barry Lipsky came over to the table where the men were sitting and Iacovetti introduced him as the young man who would pass the stolen securities. Dentarmaro and Waggenheim went to another table while Cardillo and Teresa explained that Lipsky was to open a brokerage account under an assumed name, through which the securities would be cashed.

Teresa, Cardillo, Waggenheim and Dentarmaro then went to the Thunderbird Hotel on Miami Beach where

they met Anthony De Rosa and a man called "Frankie". In February it had been pre-arranged that De Rosa and Frankie would obtain and supply stolen securities. Frankie said that he would have to call New York, to check on the availability of stolen securities. Frankie placed a call to someone named "Jerry" and asked Jerry to fly to Miami with the stock which he had on hand.

The next day Teresa, Cardillo, Waggenheim, Dentarmaro, De Rosa, Frankie and Jerry met at the Thunderbird Hotel. Teresa selected certain stocks from among the securities which Jerry brought to Miami. Teresa, Waggenheim and Dentarmaro carried the securities Teresa had selected to Cardillo's home in Miami. Cardillo selected some American Express stock as the best for the purposes of their plan. Then Cardillo called Lipsky and arranged an appointment with him for Teresa to endorse the certificates in the name of "Paul McGaughy".[4]

That night all the appellants again met with Teresa at the Casa Luigi. Teresa told Iacovetti that the stocks had been given to Lipsky and they should be paid for the stocks in a short time. Later Teresa left the Miami area to appear in separate trials in Massachusetts and Maryland.

Approximately the first week of April, Cardillo telephoned Teresa in Baltimore, Maryland, and told him that the payment was ready. Teresa flew into Miami, met with Lipsky at a bank, and cashed two checks totaling over $43,800.

Assuring Lipsky that he would be paid his share of the proceeds later, Teresa went to the Thunderbird Hotel

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[4] Mr. McGaughy was the registered owner of the stock. The stock had been sent to New York from Atlanta, Georgia, to be broken down into smaller denominations. Mr. McGaughy testified that the endorsement on the certificates were not his.

where he met with Cardillo, De Rosa, Dentarmaro and Waggenheim. The money was split into shares with everyone present receiving a share. Shares were also set aside for Lipsky and Iacovetti.

Other evidence consisted of registration cards of the Thunderbird Hotel which indicated that Waggenheim and Cardillo paid hotel bills on April 3, 1969, the same day they received their shares of the money.

III

The Law of Double Jeopardy

At a very early date the Supreme Court confronted a double jeopardy issue, *United States* v. *Perez*, 22 U.S. 579, 6 L.Ed. 165 (1824), opinion by Mr. Justice Story. A jury in a capital case had been unable to agree upon a verdict and had been discharged *without the consent of either the defendant or the prosecution.* The defendant then claimed that a second trial for the same offense would constitute double jeopardy. This contention was rejected. The Supreme Court said:

> "We think, that in all cases of this nature, the law has invested the courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound judicial discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and in capital cases especially, the court should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner."

This decision announced the governing principles in a

case in which the defendant had not consented to the discharge of the jury.

Other Supreme Court cases on the subject are: *Wade* v. *Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949); *Gori* v. *United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); *United States* v. *Tateo*, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); *Downum* v. *United States*, 372 U.S. 734, 10 L.Ed.2d 100 (1963) and *Green* v. *United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1958).

For example *Wade* stated that in determining whether a trial should be terminated without judgment no abstract formula should be mechanically applied but all circumstanstances should be taken into account.

Green agreed that a second trial is not barred where unforeseeable circumstances arise during the first trial making its completion impossible.

Gori stated that where a trial judge is of the opinion that the ends of substantial justice cannot be obtained without discontinuing the trial then a mistrial can be declared even over the objection of the defendant [citing cases] 367 U.S. at 368.

One hundred and forty six years after *Perez* the Superior Court had before it another double jeopardy case, *United States* v. *Jorn*, 400 U.S. 470, 475, 91 S.Ct. 547, 557, 27 L.Ed.2d 543 (1971) [argued and re-argued].

There, after reviewing the cases, including the customary quotation from *Perez*, supra, Mr. Justice Harlan, writing the plurality opinion stated:

> "Thus where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." 400 U.S. at 485.

To like effect, see *Vaccaro* v. *United States*, 5 Cir., 1966,

360 F.2d 606; *United States* v. *Burrell*, 6 Cir., 1963, 324 F.2d 115, 119, cert. denied 376 U.S. 937.

The appellants here, for the reasons already stated, moved for severances, or mistrials, or both. They not only contended that this was for their benefit but urged that it was absolutely essential. They knew that, if granted, these motions would inexorably necessitate trial to another jury. That was what they were asking for, they got it, and having thus succeeded in their strategy they cannot now be heard to invoke the bar of double jeopardy.

Appellants argue that the mistrial is attributable to the government since the government should earlier have called to the attention of the court Teresa's implication of Kessler. But the Teresa-Kessler connection was wholly unrelated to the present charges and was neither part of the government's case nor germane to any possible defense. The government voluntarily called attention to the connection so that the matter would not inadvertently be touched upon by defense counsel. Thereupon the defense, insisting that it wanted to delve into the matter, convinced the judge that their rights would be prejudicated by the continuation of the trial. So, we reject this argument. See *United States* v. *Pridgeon*, 5 Cir., 1972, —— F.2d —— [No. 72-1351, June 30, 1972].

IV

Other Assignments of Error

A. Reading the Grand Jury Testimony

Lipsky's grand jury testimony was read to the jury at the request of appellants as part of their case, except Waggenheim later stated that he did not want the testimony considered as part of his defense. In questioning Lipsky *before the grand jury*, the prosecution stated that they had information that Lipsky met with Iacovetti and two others to arrange for the sale of the stolen stock.

In this situation, we apply the test stated by this Court

in *McMillian* v. *United States*, 363 F.2d 165, 169 (1966):

> "The inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt."

At the time the testimony taken before the grand jury was read to the trial jury, the prosecution had already presented its evidence and therefore the jury was aware of the reasons for the reference to the alleged Lipsky-Iacovetti meeting. Thus we hold that any possible error in the admission of this item was harmless beyond a reasonable doubt, Federal Rules of Criminal Procedure 52(a).

B. Motions for Severance

The denial of the motions for severance for Cardillo and Waggenheim was within the sound discretion of the trial judge. Absent a showing of prejudice resulting from the failure to grant such a motion, the ruling will not be disturbed on appeal, *Gordon* v. *United States*, 5 Cir., 1971, 438 F.2d 858, cert. denied 404 U.S. 828; *Tillman* v. *United States*, 5 Cir., 1969, 406 F.2d 930.

Cardillo and Waggenheim contend they were prejudiced by their inability to call certain of their co-defendants to testify on their behalf. But neither Waggenheim nor Cardillo made a clear showing that these co-defendants would be willing to take the stand and give exculpatory testimony. Thus there was no abuse of discretion in denying the motions for severance, *Smith* v. *United States*, 5 Cir., 1971, 385 F.2d 34; *United States* v. *Bethea*, 3 Cir., 1971, 446 F.2d 30, cert. denied 404 U.S. 1003.

C. Admission of Hotel Records

We are equally unimpressed with Cardillo's and Waggenheim's contention that the court erred in admitting the records of the Thunderbird Hotel without requiring a showing of their prior impecuniosity. These records

indicated that on April 3, 1969, the day the money received from the sale of the stolen securities was divided, hotel bills amounting to $203.32 for Waggenheim and to $1500 for Cardillo were paid.

Since there is other evidence of the guilt of the appellants and since the acquisition of the money was the natural fruit of the crime, evidence showing a sudden increase in wealth of the accused without a prior showing of impecunious circumstances is admissible, *United States* v. *Manning*, 5 Cir., 1971, 440 F.2d 1105, cert. denied 404 U.S. 837; *United States* v. *Crisp*, 7 Cir., 1971, 435 F.2d 354.

D. Admission of Telephone Conversation

Iacovetti contends that the trial court erred in allowing Teresa to testify concerning a telephone conversation between himself and Teresa several days after the proceeds of the conspiracy had been divided. This telephone conversation, initiated by Teresa, was to ascertain whether Iacovetti had received his share of the money which was left with Cardillo.

Where, as here, the criminal aim of a conspiracy is to make a profit by illegal means, such a conspiracy continues until the fruits of the crime have been disposed of. Consequently, conversations concerning the payment of the money here involved are not admissible on the ground that such conversations took place after the completion of the conspiracy, *United States* v. *Sopher*, 7 Cir., 1966, 362 F.2d 523, cert. denied 385 U.S. 928; *Atkins* v. *United States*, 9 Cir., 1962, 307 F.2d 937.

E. Sufficiency of the Evidence

In support of his contention that there was insufficient evidence to sustain his conviction, Iacovetti claims that as a matter of law the testimony of Teresa was unbelievable and therefore not sufficient to support a conviction.

Admittedly, Teresa's testimony constituted the crucial evidence against Iacovetti. However, the uncorroborated

testimony of an accomplice is sufficient to support a conviction in the federal courts if it is not on its face incredible or otherwise unsubstantial, *United States* v. *Prentiss*, 5 Cir., 1971, 446 F.2d 923; *United States* v. *Bays*, 5 Cir., 1971, 448 F.2d 977; *United States* v. *Stanley*, 5 Cir., 1970, 433 F.2d 637; *Tillery* v. *United States*, 5 Cir., 1969, 411 F.2d 644.

The trial court, realizing that Teresa was admitting complicity and had admitted that he was in a position to gain favors from the government by his testimony, properly charged the jury to accept his testimony with great caution and to weigh it with care. Thereafter his credibility and the weight accorded to his testimony were issues to be decided by the jury, *United States* v. *Stanley*, *supra*.

Iacovetti also contends that his conviction cannot be sustained because he did not have knowledge of the interstate character of the stock and consequently could not have intended to commit a federal crime. Should the plan have been to sell stolen securities which had been transported in or stolen from *intrastate* commerce, Iacovetti might have been guilty of conspiring to steal or sell, acts which only constitute violations of state law.

However, all participants in this conspiracy, including Iacovetti, had an all encompassing disregard as to whether the stolen securities had an interstate or an intrastate character. They were only concerned about their sale. There was no showing that the conspiracy was part of a plan to sell stolen securities which were only of a local nature.

Where the plan, as in this case, is to sell stolen securities, regardless of whether they have an interstate or intrastate character, we believe that the scope of the conspiracy can be found broad enough to imply intent to commit a federal crime such as in *Nasiff* v. *United States*, 8 Cir., 1966, 370 F.2d 147, cited with approval in *United States* v. *McGann*,

5 Cir., 1970, 431 F.2d 1104, 1108, cert. denied 401 U.S. 919.

When the evidence of a conspiracy is shown, only slight additional evidence is required to connect a particular defendant with that conspiracy, *United States* v. *Modaro*, 5 Cir., 1972, 454 F.2d 167; *United States* v. *McGann, supra.* After viewing the evidence in this case in the light most favorable to the government, as we are required to do on appeal, *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 87 L.Ed. 680 (1942), we hold that there was sufficient evidence to implicate Iacovetti with the overall conspiracy.

The convictions of all appellants are

AFFIRMED.

APPENDIX B

IN THE

United States Court of Appeals

For the Fifth Circuit

No. 71-2887

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,
v.
DAVID ROBERT IACOVETTI,
WILLIAM VITO DENTARMARO,
ROBERT CARDILLO and
PHILLIP WAGGENHEIM,
DEFENDANTS-APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING

(October 5, 1972)

Before TUTTLE, COLEMAN and CLARK
Circuit Judges.

PER CURIAM: IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause on behalf of David Robert Iacovetti, William Vito Dentamaro, and Phillip Waggenheim be and the same are hereby DENIED.

We specially note the strong and repeated assertions,

on the petition for rehearing as well as in the original briefs, that the evidence was insufficient to show that Iacovetti knew "that the plan was to sell securities which would pass interstate". These protestations, on petition for rehearing, justified a fresh re-examination of the trial record.

This re-examination directed our attention to the following facts:

1. The first discussion of the securities at the Casa Luigi Restaurant in March, 1969, involved Iacovetti, Teresa, Cardillo, and Waggenheim. The others asked Iacovetti if he knew anyone in a brokerage firm that would help them move stolen securities. Iacovetti was very much concerned about how much trouble might be involved [T.R., 70-71];

2. At another meeting at the Casa Luigi, with Iacovetti, Teresa, Waggenheim, and Cardillo present, Iacovetti introduced the group to the stockbroker Lipsky. Again, Iacovetti was much concerned about how much trouble was involved and asked several questions to insure that Lipsky would not be in danger of being found out [T.R., 72-76];

3. At another meeting at the Casa Luigi, when Iacovetti, Teresa, Cardillo, Willie "D", and Waggenheim were present, Teresa told Iacovetti that he had signed the stocks and that everything was all right [T.R., 110];

4. Teresa testified that from the time he first met Lipsky until the time that he turned the stolen stock certificates over to him he saw Iacovetti every night in the Casa Luigi [T.R., 227].

As was pointed out in the original opinion in this case, the same night that Iacovetti introduced the remaining participants to Lipsky, the stolen securities were ordered down from New York (although not in Iacovetti's presence), arrived the next day, and Lipsky was called imme-

diately. When the proceeds of the sale of the stolen stock were divided at the Thunderbird Hotel Cardillo, De Rosa, Dentamaro, and Waggenheim set aside shares of the spoils for Lipsky and Iacovetti.

In addition to that recited in the original opinion, this testimony left the jury in position to infer from all of the evidence beyond a reasonable doubt that Iacovetti understood the interstate aspect of his activities. Iacovetti was involved in the operation from the start, he was very solicitous to see to it that neither he nor Lipsky would get into any trouble, and he was in daily contact with Teresa until the stocks were actually turned over to Lipsky, the man he had brought into the illegal operation.

Therefore, with due regard for the vigorous efforts of counsel on this point, the argument as to Iacovetti is rejected.